

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0682

JEANETTE DIAZ, LEAH HOFFMAN-)
BERNHARDT, RACHEL LAUDON,)
individually and on behalf of others similarly situated,)
)
Plaintiffs and Appellants,)
)
v.)
)
BLUE CROSS AND BLUE SHIELD OF MONTANA,)
INC., NEW WEST HEALTH SERVICES, MONTANA)
COMPREHENSIVE HEALTH ASSOCIATION,)
STATE OF MONTANA, AND JOHN DOES 1-100)
)
Defendants and Appellees.)

**BLUE CROSS AND BLUE SHIELD OF MONTANA, INC.'S
MOTION TO STRIKE**

Appeal from the District Court of the First Judicial District
of the State of Montana in and for the County of Lewis and Clark
Cause No. BDV-2008-956
The Honorable Jeffrey Sherlock

Appearances

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INTRODUCTION

Blue Cross and Blue Shield of Montana, Inc., respectfully moves this Honorable Court for an order striking Exhibits 3, 4, 5, 6, 7, 8, 9 and 10 in Appellants' Appendix as well any reference, statement, argument or citation to or about such items in Appellants' Opening Brief. It is fundamental Montana appellate law that "parties on appeal are bound by the record and may not add additional matters in briefs or appendices." *See Bahm v. Southworth*, 2000 MT 244, ¶11, 301 Mont. 434, 10 P.3d 99, *citing*, *Groves v. Clark*, 1999 MT 117, ¶ 22, 294 Mont. 417, 982 P.2d 446. None of the identified exhibits, or any corresponding reference, statement, argument or citation to those items, were part of the district court record in its consideration of Appellants' certification request.

In accordance with Rule 16(1), M.R.App. P., the undersigned contacted one of Appellants' counsel concerning the motion and Appellants' attorneys object to the motion.

ARGUMENT

This Honorable Court has condemned the practice of a party who attempts to supplement the district court record with matters outside of the record. *State v. MacKinnon*, 1998 MT 78, ¶15, 288 Mont. 329, 957 P.2d 23. "We will not tolerate an attempt to introduce extraneous information into the proceedings." *Id.*, *citing*

authority.

Appellants may not rely upon evidence that was not part of the district court record in its consideration of their class certification motion. Here, they have attempted to supplement the record with Exhibits 3-10 which were not part of the district court record. Moreover, their arguments, reference, statements and citation to these matters in their Opening Brief were not presented to the district court during its consideration of their certification request. Appellants' attempt to supplement the record with Exhibits 3-10 is inappropriate. Accordingly, these exhibits and any argument, statement, reference or citation to them should not be considered in this appeal of the district court's Order denying Appellants' Motion for Class Certification.

CONCLUSION

For the foregoing reasons, Blue Cross and Blue Shield of Montana, Inc. respectfully requests that this Honorable Court find that its motion is well taken, and strike Exhibits 3, 4, 5, 6, 7, 8, 9 and 10, as well as any arguments, statements, reference or citation to those items contained in Appellants' Brief and Appendix. These additional matters were not included in the district court record considered with respect to Appellants' class certification motion. Appellants' attempt to introduce this extraneous information is intolerable and does not comply with the

Montana Rules of Appellate Procedure and controlling case law.

Respectfully submitted this 20th day of April 2010.

MCMAHON LAW FIRM, PLLC

By

A handwritten signature in black ink, appearing to read 'Michael F. McMahon', is written over a horizontal line.

Michael F. McMahon
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**ATTORNEYS FOR BLUE CROSS AND
BLUE SHIELD OF MONTANA, INC.**

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that a copy of the foregoing **BLUE CROSS AND BLUE SHIELD OF MONTANA, INC.'S MOTION TO STRIKE** was served upon the following by mailing a true and correct copy thereof on April 20, 2010, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing is proportionally spaced using 14 point Times New Roman font; is double spaced; and the word count calculated by WordPerfect X4 for Windows, contains 706 words and is not more than 3 pages, excluding certificate of service and certificate of compliance.

Respectfully submitted this 20th day of April 2010.



Michael F. McMahon